FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 21 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 595

WILLIAM PESSER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

H. CLIFFORD ALLEN
401 Third Street, N.W.
Washington, D. C.
Attorney for Petitioner

INDEX

	Page
Opinions below	2
Jurisdiction	2
Statement	3
Questions Presented	2
Constitutional Provision	2
Statute Involved	3
Reasons for granting the Writ	5
Conclusion	7
Appendix No. 1	8
Appendix No. 2	14
Appendix No. 3	15
Appendix No. 4	15

CITATIONS

Arndstein v. McCarthy, 254 U.S. 138	5
Bowers v. United States, 92 D.C. Appeals 79	6
Brown v. United States, 356 U.S. 148	5, 11
Curcio v. United States, 354 U.S. 118	5
Quinn v. United States, 349 U.S. 155	5, 11
Rogers v. United States, 340 U.S. 367	5
Watkins v. United States, 354 U.S. 178	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

WILLIAM PRESSER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, William Presser, respectfully prays for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia, entered on October 27, 1960, affirming the judgment of the District Court of the United States for the District of Columbia.

The Opinion Below

The opinion of the United States District Court of Appeals for the District of Columbia, has not yet been reported, but a copy of said opinion is attached hereto and prayed to be taken as a part hereof, marked Appendix No. 1.

Jurisdiction

The opinion of the United States Court of Appeals for the District of Columbia was rendered on the 27th day of October, 1960. The petitioner filed a Petition For Rehearing en banc, in the United States Court of Appeals for the District of Columbia, which was denied on November 22, 1960, marked Appendix No. 2. Jurisdiction to issue the writ is found in the provisions of Section 240(a) of the Judicial Code (28 U.S.C.A., Sec. 1254).

Questions Presented

I

Whether the witness before a Senate Committee here waived his constitutional right to decline to answer further questions to which he asserted his constitutional right against self-incrimination because he had answered two prior questions dealing with his compliance with the subpoena served upon him.

II

Whether the witness was properly ordered to answer the question for which he was indicted.

III

Whether the question, for which he was indicted, "You have destroyed no records since then?", and to which he claimed his privilege under the Constitution, was pertinent.

Constitutional Provision

Amendment 5:

> No person shall • • • be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law • • •

Statute Involved

Title 2 United States Code, 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000.00 nor less than $100.00 and imprisonment in a common jail for not less than one month nor more than twelve months.

Statement

Petitioner, William Presser, was charged in a one count indictment with contempt of Congress (Title 2 United States Code 192). (3A).*

The petitioner, William Presser, received in Cleveland, Ohio, a forthwith subpoena on March 23, 1958, to appear before the Senate Select Committee on Improper Activities in the Labor or Management Field and bring with him his personal records and books. The petitioner was told that he would receive notice later as to an exact date. On September 17, 1958, the petitioner was questioned concerning his compliance with the subpoena as follows:

"The Chairman. Has the witness complied with it? First, are you now ready to comply with the subpoena?

Mr. Presser. I have complied to the best of my ability.

The Chairman. What have you done in compliance with it? (The witness conferred with his counsel.)

---

* References suffixed "a" are to the Appendix filed by petitioner in the Court of Appeals, nine copies of which have been filed in this court.

Mr. Presser. May I have the question again, sir?

The Chairman. What have you done? You said you have complied to the best of your ability. What have you done in compliance?

Mr. Presser. I have made available all records I could get together.

Mr. Presser. I have delivered to the committee everything I had available and could lay my hands on.

The Chairman. At the time the subpoena was served?

Mr. Presser. Yes sir.

The Chairman. You have destroyed no records since then?

Mr. Presser. I respectfully decline to answer the question and assert my privilege under the fifth amendment of the United States Constitution not to be a witness against myself.

The Chairman. Now, then, you said you had complied to the best of your ability. The best of your ability would be to deliver records, produce them as ordered by the subpoena, such records as you had, and not destroy them. I ask you the question again: Have you destroyed any of the records called for by this subpoena?

Mr. Presser. I respectfully decline to answer the question and assert my privilege under the fifth amendment of the United States Constitution not to be a witness against myself.

The Chairman. You are ordered—with the permission of the committee the Chair orders and directs you to answer that question.

Mr. Presser. I honestly believe that if I am forced to answer the question I will be forced to be a witness against myself in violation of my rights under the fifth amendment of the United States Constitution.

The petitioner was indicted for not answering the question "You have destroyed no records since then," although

he was not ordered to answer that question but a question thereafter.

Reasons for Granting the Writ

The Court of Appeals has ~~interrupted~~ misapplied an important Constitutional Provision in apparent conflict with the applicable decisions of this Court.

1. *Waiver.* The petitioner respectfully submits that he did not waive his privilege under the Fifth Amendment of the Constitution of the United States by answering the two prior questions with regard to his compliance to the subpoena which was served upon him. The inquiry concerning his compliance with the subpoena had at that time been completed. He was then asked the following question "You have destroyed no records *since then?*" We do not believe any petitioner can waive his rights to answer incriminating questions because he has answered other questions on the same subject matter, but here in any event the petitioner was being asked for the first time about a *new subject* and the petitioner therefore cannot be said to have waived his privilege by answering the said two prior questions.

In investigations by Congressional Committees, more answers would be received, we submit, if the doctrine of waiver was not so strictly interpreted by the Committees as that often makes a witness decline to answer numerous questions so as to not waive his privilege to the one question where he rightfully fears incrimination. *Brown* v. *United States* 356 U.S. 148, *Rogers* v. *United States*, 340 U.S. 367, *Arndstein* v. *McCarthy*, 254 U.S. 138, *Curcio* v. *United States*, 354 U.S. 118.

2. *Direction to Answer.* The petitioner was never ordered to answer the question for which he was indicted, *Quinn* v. *United States*, 349 U.S. 155, but was directed to answer an obviously different question. The question contained in the indictment does not limit itself to records subpoenaed, but includes any records, even those made after March 23, 1958

and before September 17, 1958. This is shown in the Joint Appendix in the United States Court of Appeals at Page 16 as follows:

"YOU HAVE DESTROYED NO RECORDS SINCE THEN."

The question which he was directed to answer is,

"HAVE YOU DESTROYED ANY OF THE RECORDS CALLED FOR BY THIS SUBPOENA."

On the same page for the first time he is ordered to answer a question. "You are ordered, with the permission of the Committee the Chair orders and directs you to answer *that* question." This direction must of necessity pertain to the question immediately preceding and not to the first one.

3. *Pertinancy.* The third question involved here is the one of pertinency. The petitioner was asked, "You have destroyed no records since them?" The question was too broad and inclusive to be deemed pertinent to the inquiry. This question of necessity would include any sort of a record ever kept by the witness up to and including the time he testified. It would include personal matters that had nothing to do with labor or management or financial transactions linking the two together. If the witness had kept a diary or any records concerning his private life and had destroyed the same after March 23, 1958, in answering the critical question, which is the subject matter of the indictment, he would have to disclose such destruction. Such matters were certainly not pertinent to the inquiry that the committee was authorized to conduct.

The government, of course, must allege pertinency in the indictment and has the burden of proving it and the witness does not have to make the claim that the question is not pertinent when he declines to answer. *Bowers* v. *U.S.*, 92 D.C. Appeals 79.

In *Watkins* v. *U.S.*, 354 U.S. 178, the Court said:

"*Kilbourn* v. *Thompson* teaches that such an investi-

gation into individual affairs is invalid if unrelated to any legislative purpose. That is beyond the powers conferred upon the Congress in the Constitution. *United States* v. *Rumely* makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly."

Conclusion

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

H. Clifford Allder,
401 Third Street, N.W.
Washington, D. C.
Attorney for Petitioner.

APPENDIX NO. 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 27, 1960, Joseph W. Stewart, Clerk

No. 15,697

WILLIAM PRESSER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided October 27, 1960

Mr. H. Clifford Allder for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, Chief Judge, and BAZELON and BURGER, Circuit Judges.

WILBUR K. MILLER, *Chief Judge*: Early in 1958 the Senate Select Committee on Improper Activities in the Labor

or Management Field was investigating an alleged misappropriation of funds belonging to the Teamster's union.

On March 19, 1958, it issued a subpoena for appellant, William Presser, a Teamsters official in Ohio, to testify and to produce his personal financial records for an indicated period. Before appearing as a witness Presser delivered to the Committee's staff at Cleveland certain books and documents relating to his personal affairs. Thereafter, the Committee heard evidence indicating Presser had not furnished all the material sought but had destroyed some of the personal records he had in his possession at the time he was served with process. When he appeared as a witness, the Senators sought to ascertain from him whether, after service of the subpoena, he had destroyed some of the records called for, or had fully complied with the subpoena.

Being of the opinion that Presser's refusal to answer certain questions propounded to him on this subject was not justified by his reliance on the Fifth Amendment and constituted contempt of the Senate, the Committee caused the matter to be certified to the United States Attorney for the District of Columbia. Later on, the grand jury indicted Presser for contempt of Congress for unlawfully refusing to answer the following question: "You have destroyed no records since then [the time of the service of the Committee's subpena, dated March 19, 1958, calling for certain personal records of defendant]?" Having waived a jury trial, Presser was found guilty by a judge of the United States District Court, who fixed his punishment at imprisonment for a period of two months and a fine of $100. Presser appeals.

Appellant's first point on appeal is that his plea of the Fifth Amendment protected him in his refusal to answer the question set forth in the indictment. In reply, the Government contends Presser waived the privilege with respect to that question by his testimony in the following colloquy, particularly the portions we have italicized:

"The Chairman. . . . First are you now ready to comply with the subpena?

• • • •

"Mr. Presser. I have *complied to the best of my ability.*

• • • •

"The Chairman. What have you done? You said you have *complied to the best of your ability.* What have you done in compliance?

"Mr. Presser. I have *made available all records I could get together.*

• • • •

"The Chairman. You said you had *complied to the best of your ability.* Have you delivered to the committee all of the records called for here that were in your possession or under your control and available to you at the time the subpena was served?

"Mr. Presser. I have delivered to the committee *everything I had available* and could lay my hands on.

"The Chairman. At the time the subpoena was served?

"Mr. Presser. Yes, sir.

"The Chairman. You have destroyed no records since then?

"(The witness conferred with his counsel.)

"Mr. Presser. I respectfully decline to answer the question and assert my privilege under the fifth amendment of the United States Constitution not to be a witness against myself.

"The Chairman. Now, then, you said you had complied to the best of your ability. The best of your ability would be to deliver records, produce them as ordered by the subpena, such records as you had, and not destroy them.

"I ask you the question again: Have you destroyed any of the records called for by this subpena?

"Mr. Presser. I respectfully decline to answer the question and assert my privilege under the fifth amend-

ment of the United States Constitution not to be a witness against myself.

"The Chairman. You are ordered—with the permission of the committee the Chair orders and directs you to answer that question.

"Mr. Presser. I honestly believe that if I am forced to answer the question I will be forced to be a witness against myself in violation of my rights under the fifth amendment of the United States Constitution."

Had appellant refused, on the ground the answer might incriminate him, to answer the question whether he had complied with the subpoena, his reliance on the Fifth Amendment would have protected him in his refusal to answer. But when he chose to answer that question, and said he had complied with the subpoena to the best of his ability and had given the Committee everything he had at the time of service, he subjected himself to cross-examination as to how he had complied. That is to say, having testified that he had complied with the subpoena to the best of his ability, Presser waived the Fifth Amendment privilege, which otherwise would have protected him in refusing to answer the question as to whether he had destroyed any pertinent records. *Brown* v. *United States*, 356 U.S. 148 (1958).

Appellant next contends the Committee did not order him to answer the question set forth in the indictment, but directed him to answer another and different question: "Have you destroyed any of the records called for by this subpena?" He cites *Quinn* v. *United States*, 349 U.S. 155 (1955), which does indeed hold that refusal to answer a pertinent question is not contempt unless the witness was ordered and directed to answer it.

We are of the opinion that Presser was ordered to answer the very question quoted in the indictment. This becomes apparent when some of the questions and answers heretofore quoted are thus abbreviated:

"The Chairman. You have destroyed no records since then [the time of service of process]?"

The witness conferred with his counsel and then refused to answer, pleading the Fifth Amendment.

> "The Chairman. . . . I ask you *the* question again: Have you destroyed any of the records called for by this subpena?"

Again Presser refused to answer.

> "The Chairman. You are ordered — with the permission of the committee the Chair orders and directs you to answer *that* question." (Emphasis supplied.)

Thus, what appellant calls the "second question" was in reality a repetition of what he calls the first. The Chairman so characterized it. He prefaced the "second question" with the words, "I ask you the question again," and added, "[T]he Chair orders and directs you to answer that question."

Appellant argues, however, that the direction to answer whether he had destroyed any records "called for by this subpena" was not a direction to say whether he had destroyed any records "since then"—the indictment question. His point seems to be that the absence of the descriptive words "called for by this subpena" from the indictment question made that question substantially different from the restatement of it; and that the specific direction to answer applied only to the latter. This attempt to distinguish between the "first" and "second" questions must fail, for the reason that the two questions which preceded the indictment question sufficiently identified the records referred to by it as those "called for by this subpena." We think the witness could not have failed to understand he was being told to answer the indictment question.

Lastly, appellant urges that the question quoted in the indictment was not pertinent to the Congressional inquiry. Although he states in his brief "that the second question is definite and pertinent," he contends the first or indictment question "is not definite and includes in its broadness things not pertinent."

Again, the point is based upon the absence of the words, "called for by this subpena," from the indictment. The argument assumes that pertinency must appear from the indictment question itself, standing alone, in isolation from its context. Under that theory, the Government would have been allowed to prove only that Presser was asked the indictment question and refused to answer it; proof of preceding or succeeding questions which showed pertinency would not have been permitted. The prosecution is not so limited. It may, as it did here without objection, introduce the entire testimony of the recalcitrant witness, to show the background and setting of the indictment question as well as its significance and pertinence.

The contention that the question quoted in the indictment was not pertinent to the inquiry is refuted also by what we regard as the appellant's concession of pertinency. This is seen from the fact, already shown, that Senator McClellan said the "second question"—which Presser admits was pertinent—was merely a repetition of the first or indictment question. The substantial identity of the two queries has been amply demonstrated.

Even in the absence of the two questions which preceded it, the indictment question could hardly have been understood to refer to any records except those "called for by this subpena." We do not think Presser could have failed to understand that the Committee was asking if he had destroyed any records relating to his personal financial affairs during the period under scrutiny. He could not reasonably have supposed the indictment question asked whether he had destroyed records which did not pertain to his personal financial transactions and which were not called for by the subpoena. We cannot accept the suggestion that the question quoted in the indictment was not pertinent to the inquiry.

Affirmed.

APPENDIX NO. 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

No. 15,697

SEPTEMBER TERM, 1960

Filed November 22, 1960, Joseph W. Stewart, Clerk

WILLIAM PRESSER, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Before: Wilbur K. Miller, Chief Judge, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: November 22, 1960

APPENDIX NO. 3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

No. 15,697

SEPTEMBER TERM, 1960

Criminal 956-59

Filed October 27, 1960, Joseph W. Stewart, Clerk

WILLIAM PRESSER, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court
for the District of Columbia.

Before: Wilbur K. Miller, Chief Judge, and Bazelon and Burger, Circuit Judges.

APPENDIX NO. 4

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Chief Judge Wilbur K. Miller

Dated: October 27, 1960.

FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 16 1961
JAMES R. BROWNING, Clerk

No. 595

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM PRESSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 595

WILLIAM PRESSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 8-13) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1960. A petition for rehearing *en banc* was denied on November 22, 1960. The petition for a writ of certiorari was filed on December 21, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, after testifying that he had produced all records available to him at the time of service of a subpoena *duces tecum*, a witness before a Congressional committee could refuse, on grounds of privilege, to disclose whether he had destroyed records since the time of service.

2. Whether the witness was properly ordered to answer the question on which the indictment was based.

3. Whether the question which petitioner refused to answer was pertinent to the inquiry.

STATEMENT

Having waived a jury trial, petitioner was convicted in the United States District Court for the District of Columbia of a violation of 2 U.S.C. 192 for having refused to answer a pertinent question put to him by the Senate Select Committee on Improper Activities in the Labor Management Field. He was sentenced to imprisonment for two months and to pay a fine of $100. On appeal, the judgment was affirmed.

Petitioner, a teamster official, had been served in March, 1958, with a personal subpoena and a subpoena *duces tecum* to produce certain records. At his appearance before the committee in September, 1958, at which he was accompanied by counsel, petitioner claimed the privilege against self-incrimination in relation to questions which sought to solicit testimony from him (J.A. 7-14). Committee counsel then

stated that he would like to go into the matter of the records which had been tendered by petitioner and that he would like to ask petitioner "some questions about whether any of the records have been destroyed" (J.A. 14).

After summarizing the contents of the subpoena, counsel asked "Have you complied with that subpena?". Petitioner at that point declined to answer and asserted his privilege under the Fifth Amendment (J.A. 14). The chairman of the committee then questioned a member of the staff as to what records had been delivered and asked petitioner whether he was "ready to comply with the subpena" (J.A. 15). Petitioner, after consulting with counsel, stated he had "complied to the best of my ability" (J.A. 15). The following then ensued (J.A. 15-17):

> THE CHAIRMAN. You said you had complied to the best of your ability. Have you delivered to the committee all of the records called for here that were in your possession or under your control and available to you at the time the subpena was served?
>
> MR. PRESSER. I have delivered to the committee everything I had available and could lay my hands on.
>
> THE CHAIRMAN. At the time the subpena was served?
>
> MR. PRESSER. Yes, sir.
>
> * * *
>
> THE CHAIRMAN. You have destroyed no records since then?
>
> * * *
>
> (The witness conferred with his counsel.)

MR. PRESSER. I respectfully decline to answer the question and assert my privilege under the fifth amendment of the United States Constitution not to be a witness against myself.

THE CHAIRMAN. Now, then, you said you had complied to the best of your ability. The best of your ability would be to deliver records, produce them as ordered by the subpena, such records as you had, and not destroy them.

I ask you the question again: Have you destroyed any of the records called for by this subpena?

MR. PRESSER. I respectfully decline to answer the question and assert my privilege under the fifth amendment of the United States Constitution not to be a witness against myself.

THE CHAIRMAN. You are ordered—with the permission of the committee the Chair orders and directs you to answer that question.

MR. PRESSER. I honestly believe that if I am forced to answer the question I will be forced to be a witness against myself in violation of my rights under the fifth amendment of the United States Constitution.

THE CHAIRMAN. You have already testified that you have complied with the subpena to the best of your ability. This tests the truthfulness of that statement. For that reason and the committee desires to ascertain whether you have complied according to the best of your ability, or whether you have made that statement falsely and, instead, destroyed rec-

ords that the subpena called upon you to produce.

(The witness conferred with his counsel.)

MR. PRESSER. I respectfully decline to answer the question and assert my privilege under the fifth amendment of the United States Constitution not to be a witness against myself.

THE CHAIRMAN. You are ordered and directed to answer the question, with the approval of the committee.

MR. PRESSER. I honestly believe that if I am forced to answer the question I will be forced to be a witness against myself in violation of my rights under the fifth amendment of the United States Constitution.

THE CHAIRMAN: That is a continuing order. You will return at 2 o'clock this afternoon and will be further interrogated about it. * * *

After the noon recess, petitioner was again ordered to state whether he had destroyed any records since the subpoena was served; again, he declined (J.A. 18-19).

The indictment was based on petitioner's refusal to respond to the question "You have destroyed no records since then?" The court of appeals affirmed the conviction on the authority of *Brown* v. *United States*, 356 U.S. 148. It stated (Pet. 11):

Had appellant refused, on the ground the answer might incriminate him, to answer the question whether he had complied with the subpoena, his reliance on the Fifth Amendment would have protected him in his refusal to an-

swer. But when he chose to answer that question, and said he had complied with the subpoena to the best of his ability and had given the Committee everything he had at the time of service, he subjected himself to cross-examination as to how he had complied. That is to say, having testified that he had complied with the subpoena to the best of his ability, Presser waived the Fifth Amendment privilege, which otherwise would have protected him in refusing to answer the question as to whether he had destroyed any pertinent records. * * *

ARGUMENT

1. The courts below properly applied this Court's decision in *Brown* v. *United States*, 356 U.S. 148, to the facts of this case. Petitioner, having initially claimed privilege, abandoned that position and testified before the committee that he had complied with the subpoena to the best of his ability and had given the committee everything he had at the time of service. The question immediately following, "You have destroyed no records since then?" (the indictment question), was merely a means of testing the answer which petitioner had proffered. One who asserts that he has fully complied with a subpoena to produce personal records can hardly expect immunity from questions which seek to ascertain whether he has in fact been engaged in destroying some of those records.

This is not the situation, discussed in the *Brown* opinion, of a compelled witness who has "no occasion to invoke the privilege against self-incrimination un-

til testimony sought to be elicited will in fact tend to incriminate" (356 U.S. at 155). Petitioner was informed at the outset that the Committee wished to determine whether there had been a destruction of records in evasion of the subpoena (J.A. 14). He and his counsel were not unwittingly led into an area that appeared free of danger and forced to draw back when the possibility of incrimination appeared at a later time. Rather, this is the situation of a witness who chose to waive the privilege in order to give a one-sided version of events, and then drew back when he was asked, in different form, a question he had already undertaken to answer. The applicable language is that of this Court's opinion in *Brown* v. *United States*, 356 U.S. 148, 155:

> On the other hand, when a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a

positive invitation to mutilate the truth a party offers to tell. * * *

2. Petitioner's claim (Pet. 5-6) that he was never ordered to answer the question for which he was indicted is frivolous. Petitioner could have had no doubt that the question, "You have destroyed no records since then?", related to the records called for by the subpoena. The committee chairman merely made explicit what was implicit in the original question when he thereupon directed petitioner to answer the question, "Have you destroyed any of the records called for by this subpoena?". And if there could have been any possible doubt that the Committee, both in its initial and later questions, was interested only in the records called for by the subpoena, that was again made explicit when petitioner was given further opportunity to answer after the noon recess. In the course of that questioning, the subpoena and return were ordered to be printed in the record, but petitioner still refused to answer (J.A. 17-19).

3. Equally insubstantial is the contention that the question on which the indictment was based was not pertinent to the inquiry since the question, "You have destroyed no records since then?", was broad enough to encompass records not called for by the subpoena, which might be purely private. As set forth above, it was clear in context that the records referred to were those which had been subpoenaed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JANUARY 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE 1961 880099 752

FILE COPY

Office Supreme Court, U.S.
FILED
FEB 1 1962
JAMES R. BROWNING, Clerk

No. 595

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM PRESSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

H. CLIFFORD ALDER
101 Third Street N.W.
Washington 1, D. C.
Attorney for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 595

WILLIAM PRESSER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM

May it please the Court:

The nature of the Government's argument requires, we believe, the following short reply.

The Government states that the indictment question "was merely a means of testing the answer which petitioner had

proffered." (U.S. Br.6) But Presser was not a voluntary witness and therefore unlike Brown he had the privilege "to withdraw from the crossfire of interrogation before the reliability of his testimony has been fully tested." (Brown v. U.S. 356 U.S. 148, 155)

Furthermore, the Chairman of the Committee stated that he wished to test the truthfulness of the petitioner's statement and to ascertain whether petitioner had complied or whether he had "made that statement falsely and, instead, destroyed records that the subpoena called upon you to produce." (J.A. 15-17) Assuming, *arguendo*, that petitioner had made a false statement before the Committee he surely would have the right not to be a witness against himself and confess.

To testify that one had complied with the requirements of a subpoena *at the time it was served* leaves open and unanswered the question whether records have been destroyed —a federal criminal offense—since the time of service. This is not as the Government now states the same question "in different form" (U.S. Br.7), but a different question of different substance to which petitioner had the constitutional right to claim his privilege.

CONCLUSION

WHEREFORE, it is respectfully submitted that for these additional reasons the petition for writ of certiorari would be granted.

H. CLIFFORD ALLDER
401 Third Street, N.W.
Washington 1, D. C.
Attorney for Petitioner

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 6 1961
JAMES R. BROWNING, Clerk

NO. 595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM PRESSER, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

H. CLIFFORD ALLDER,
401 Third Street, N.W.
Washington 1, D. C.
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 595

WILLIAM PRESSER, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

May it please the Court:

Your Honors denied certiorari February 20, 1961. Mr. Justice Black and Mr. Justice Douglas were of the opinion that certiorari should be granted.

Petitioner desires to call to the attention of the Court something that has never been disclosed by the prosecution and does not appear in the record of the trial Court, the United States Court of Appeals for the District of Columbia, or in the petition for certiorari.

The petitioner was served with a subpoena on March 19, 1958 to appear before a Congressional Committee and produce certain records. The Committee postponed his appearance from time to time until September 17, 1958. Before petitioner testified, the Committee heard evidence indicating Presser had not furnished all the material sought but had destroyed some of the personal records he had in his possession at the time he was served with process. The petitioner was questioned concerning his compliance with the subpoena as follows:

"The Chairman. What have you done? You said you have complied to the best of your ability. What have you done in compliance?

Mr. Presser. I have made available all records I could get together.

Mr. Presser. I have delivered to the committee everything I had available and could lay my hands on.

The Chairman. You have destroyed no records since then?

Mr. Presser. I respectfully decline to answer the question and assert my privilege under the fifth amendment of the United States Constitution not to be a witness against myself."

The facts never disclosed or urged before to any Court that had this case is the following: From March 19, 1958 until and including March 23, 1960 an investigation was conducted by the United States Department of Justice concerning the destruction by the petitioner of records called for in the aforementioned subpoena. This investigation resulted in an indictment being returned against the petitioner in the United States District Court for the Northern District of Ohio, Eastern Division on March 23, 1960 charging that between September 9, 1958 and September 13, 1958 the

petitioner violated section 1505 Title 18, United States Code as follows:

"(a) The defendant, William Presser did alter, deface and tear, and did partially destroy, conceal and withhold from the Committee an invoice of the Rudolph Deutsch Industrial Sales Company, dated December 8, 1955, designated by number 1670 and addressed to Teamsters Joint Council #41, well knowing that said invoice was a record of Joint Council #41 which bore a reasonable relation to the subject matter of the Committee's inquiry and was relevant to it, and was required to be produced to the Committee under and in accordance with the subpoena set forth in paragraph 3."

The petitioner thereafter was tried and convicted of destroying some of the records called for by the subpoena and about which he was questioned by the Committee, and received a sentence calling for imprisonment for a period of eight months.

The petitioner submits that in view of these added facts this Honorable Court should review his conviction of contempt. In light of his subsequent conviction of destroying the records we must admit that he was in genuine fear of incrimination when he was being questioned. When he was asked if he had destroyed any of the records, immediately after having testified under oath that he had delivered them all, he certainly was justified in feeling that if he answered truthfully he would be incriminating himself for the crime of perjury. If his answer concerning the question of producing records was false then he committed perjury and his answer was the commission of the crime itself and not the admission of a crime whereby he would waive his constitutional protection against self-incrimination and have to answer to the details of the offense he had committed, as in

Rogers vs. United States 340 U.S. 367. Perjury is not contempt, Matter of Michael, 326 U.S. 224, and, therefore, we cannot say that in his first answer he is opening the door or waiving his right.

The petitioner submits that these new facts when considered with the original petition for certiorari should convince Your Honors to grant certiorari and if we are permitted to brief these matters, we hope to be able to contribute to the continuance of the effort of this Court to see that justice is done according to law.

Respectfully submitted,

H. CLIFFORD ALLDER

Counsel for Petitioner

CERTIFICATE OF COUNSEL

H. Clifford Allder, counsel for petitioner hereby certifies that this petition for rehearing is presented in good faith and not for delay. This petition is restricted to the grounds specified in Rule 58.

H. CLIFFORD ALLDER

Counsel for Petitioner